No. 89-1518

In The

Supreme Court of the United States

October Term, 1989

KENNETH G.M. MATHER, AS TRUSTEE OF THE ESTATE IN BANKRUPTCY OF M. FRANK WATSON AND BETTY L. WATSON, AND BRIAN HARJO WATSON,

Petitioners,

v.

BILL WEAVER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This case concerns the violations of petitioners' constitutional rights that occurred when, in order to execute a writ, certain respondents broke into petitioners' home – concededly without legal authority to carry out the writ in that manner[1] – and when certain respondents seized property exempt from execution under state law without any prior opportunity for petitioners to assert their exemption claims.[2] Thus, it is not even remotely true that "the only 'question presented' * * * is whether a board of county commissioners, sheriff, and deputy sheriff may be held liable for carrying out a facially valid writ" (Weaver Br. in Opp. 18).

In our petition, we contended that the court below incorrectly dismissed three distinct claims arising out of two separate constitutional violations. We argued that petitioners have a valid Fourth Amendment claim against respondent Board of County Commissioners of Okmulgee

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[1] See Weaver Br. in Opp. 28 ("attorney Hartman's actions were not the kind of acts contemplated or condoned under Oklahoma law"); Hartman Br. in Opp. 5 ("the physical entry into a judgment debtor's home [was] an act not condoned or permitted under Oklahoma law").

[2] Respondents' contention that the only exempt property seized was a check for $6.67 (Weaver Br. in Opp. 11, 16) is flatly wrong. Oklahoma law provides that, for example, "[o]ne gun," "two bridles and two saddles," and "[a]ll household and kitchen furniture" are exempt from execution. Okla. Stat. tit. 31, § 1(A)(3), (A)(12), (A)(14) (1990 Supp.). And the inventory list attached to the Sheriff's testimony (see Weaver Depo. 31-32) indicates that, for example, guns, bridles, saddles (which the Watsons had earlier identified as their only personal guns, bridles, and saddles), a rug, and a carousel horse were seized.

County (*i.e.*, the county)[3] and respondents Weaver and Newton in their official capacities because Newton broke into their home pursuant to official county policy. We also argued that petitioners have a valid due process claim against all respondents for the seizure of their property in satisfaction of a judgment because they were not first given a hearing on their claim that much of the property was exempt under state law from judgment creditors. Last, we explained that petitioners' claim against respondent law firm for the involvement of one of its partners in the break-in could proceed on the basis of respondeat superior.

Respondents seek to conflate the breaking and entering and the seizure of petitioners' property into a single "event." They then devote most of their efforts to contending that the district court – which resolved this case on summary judgment – found as a factual matter that this "event" was too unconnected with any governmental actor or entity to give rise to official liability on Fourth Amendment grounds and to any liability on due process grounds. The Tenth Circuit's decision, however, rests

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[3] As we pointed out in the petition (Pet. 4 n.3) Oklahoma law provides that "[i]n all suits or proceedings * * * against a county, the name in which a county shall * * * be sued shall be, 'Board of County Commissioners of the County of ___.' " Okla. Stat. tit. 19, § 4 (1988). In view of this explicit directive, respondents' repeated emphasis on the lack of involvement of the Board of County Commissioners *as such* with the events underlying this lawsuit (Weaver Br. in Opp. 12-14, 21, 24) is completely beside the point. The question is whether the county can be held liable under the standards governing county liability, and respondents' assertions that the county commissioners lack power to control the Sheriff (*id.* at 13-14) serve only to *confirm* our submission (Pet. 22, 24) that the Sheriff has sufficient autonomy to be considered a county policymaker, thus subjecting the county to liability.

squarely on legal issues appropriate for review by this Court.

1. Without providing any reason, the Tenth Circuit affirmed the district court's dismissal of petitioners' Fourth Amendment claims against the county and Weaver and Newton in their official capacities. Pet. App. 3a. In our petition, we argued that official liability was proper because the breaking and entering was ordered by the District Attorney and Sheriff for Okmulgee County, each of whom has policymaking authority with respect to execution of writs.

Respondents' attempt to support the Tenth Circuit's disposition in unavailing. They assert that "[p]etitioners have been unable to ever show any official 'policy' on the part of the County Commissioners or the Sheriff which would have authorized or supported the forced entry in this case." Weaver Br. in Opp. 34. But that of course misses the point – this Court has made clear that the "official policy" need not antedate the violation; rather, *the "official policy" may be set by the violation itself if the violation is ordered by the appropriate official.* See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986); see also *Jett v. Dallas Independent School Dist.*, 109 S. Ct. 2702, 2723 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (plurality opinion).

In arguing that the breaking and entering was not ordered by policymaking officials, respondents place great weight (Weaver Br. in Opp. 24-25, 38-39) on a supposed "factual" finding by the district court that the action was "random and unauthorized" (Pet. App. 10a). But this case was resolved on summary judgment below; if the issue were indeed one of fact, the record would have to be read in the light most favorable to petitioners. More to the point, the issue is not one of fact. Even if the phrase "random and unauthorized" was the equivalent of a determination that the District Attorney and the Sheriff

are not official policymakers,[4] that determination would be reviewable de novo because it is a "question of *state law*" whether government officials are policymakers. *Jett*, 109 S. Ct. at 2723. And there is no real dispute in this case about the broad authority that state law gives to the District Attorney and the Sheriff; the question presented is whether that authority suffices to make their actions those of policymakers, as *Pembaur* indicates (see Pet. 19-22) and as numerous courts of appeals have held (see Pet. 22-25). That very important issue of federal law – on which the circuits are divided – cannot be obscured by mislabeling the district court's erroneous legal conclusion as a finding of fact.

Respondents last contend that liability is inappropriate under *Pembaur* because the District Attorney is responsible under Oklahoma law only for giving "opinion and advice" to other officials. Weaver Br. in Opp. 35-36.[5] In the first place, this responds only to part of our argument on why *Pembaur* requires reversal. As we pointed out, the *Sheriff* – who is clearly the final decisionmaker for the County in such matters – ordered the break-in. Pet. 22. But official liability is additionally appropriate

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[4] The district court made this finding because it erroneously believed that this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), which held that a Section 1983 action alleging a *due process* violation cannot proceed if the deprivation was "random and unauthorized," applied to Fourth Amendment claims as well. Pet. App. 10a n.1.

[5] Respondents also maintain that the Sheriff contacted the judge who issued the writ and that he ordered the forced entry. Weaver Br. in Opp. 12. The judge, however, testified that he simply referred the Sheriff to the District Attorney when contacted. Maley Depo. 9.

because the District Attorney's role was more than that of a legal advisor. As we acknowledged in our petition, *Pembaur* did imply that mere "legal advice" given by a prosecutor might not constitute official policy (Pet. 20 n.11); however, the Court further noted that where the "advice" is routinely followed, it can nonetheless amount to policy. See 475 U.S. at 485. And respondents nowhere contest our showing that the Sheriff automatically deferred to the District Attorney on these types of matters (Pet. 6-7, 21).

2. The Tenth Circuit dismissed outright petitioners' due process claims against all defendants on the ground that Oklahoma tort law provides postdeprivation remedies and that, under this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), no federal cause of action consequently existed. Pet. App. 3a. In our petition, we argued that *Parratt* does not govern this case – and that the due process claims are therefore tenable – because the taking of petitioners' property without a meaningful prior hearing on their exemption claims was not random and unauthorized.

Respondents assert that petitioners did not raise before the Tenth Circuit the due process claims now raised in this Court. Weaver Br. in Opp. 19-21; Hartman Br. in Opp. 3-4. When they were before the Tenth Circuit, however, respondents took a different position, asserting that the court *did* have due process issues before it. Weaver C.A. Br. 2 ("Appellees would submit that the issues for review are: 1. Whether the trial court erred in holding that the seizure of appellants' property did not violate *per se* constitutional guarantees of due process? * * * "); Hartman C.A. Br. 9 (on its facts this case "is, if any violation, one of procedural due process to which the *Parratt* doctrine clearly applies"). And the Tenth Circuit certainly did pass on the due process issues. See Pet. App. 3a (affirming summary judgments as to certain defendants in all respects); *id.* at 4a ("[o]n remand, the

district court should consider plaintiffs' fourth amendment claim * * * as it may be intertwined with the fifth amendment claim"); *id.* at 14a ("the directions on remand in the original disposition [are] modified to clarify that appellants may not proceed on their due process claim"). Thus, although respondents contend that petitioners devoted little attention to their due process claim in the court of appeals, the fact remains that that court actually passed on the issue, and the correctness of its decision is properly open to scrutiny here. See *Mills v. Maryland*, 486 U.S. 367, 371 n.3 (1988).

On the merits of the due process issue, respondents argue solely that the deprivation was random and unauthorized. But they do not dispute that Oklahoma law provides that some property is exempt from execution, that petitioners had a property right in their exempt property even though a judgment had been entered against them, or that Oklahoma law contemplates the seizure of exempt property without a pre-seizure hearing.[6] Instead, their contention rests entirely on their failure to distinguish the due process aspect of this case from the Fourth Amendment aspect. Thus, they again rely heavily upon the alleged "factual" finding by the district court that the deprivation was random and unauthorized. Weaver Br. in Opp. 24-25, 28, 31, 40-41; Hartman Br. in Opp. 5.

To begin with, the district court *made no such finding*. It determined only that the conduct giving rise to the

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[6] Respondents allude to the state procedure by which petitioners could have avoided the execution by posting a bond, as if it relieves the State from having to provide a predeprivation hearing. Weaver Br. in Opp. 28. This Court, however, has rejected the proposition that a state law provision by which a property owner can avoid a deprivation by posting security excuses the State's failure to provide predeprivation process. See *Bell v. Burson*, 402 U.S. 535, 536 (1971).

Fourth Amendment violation – the breaking and entering – was random and unauthorized. Pet. App. 10a. It made no such finding with respect to the deprivation of petitioners' property without a hearing. Indeed, it dismissed the due process claims on the entirely separate – but still erroneous (see Pet. 11 n.9) – ground that no due process violation occurred because the execution was postjudgment. Pet. App. 9a.

In any event, the question whether a deprivation was random and unauthorized is plainly one of *law* – as discussed above, this Court held last Term in *Jett* (see 109 S. Ct. at 2723) that the related question of whether a government employee may set official policy is one of *"law."* See *Easter House v. Felder*, 879 F.2d 1458, 1480-1481 (7th Cir. 1989) (Easterbrook, J., concurring) (the random and unauthorized issue "has obvious parallels to the question whether the seemingly unauthorized acts of public employees should be attributed to a local government"), vacated and remanded for reconsideration in light of *Zinermon v. Burch*, 110 S. Ct. 1314 (1990). Thus, even had the district court made such a finding, the issue would be one appropriate for this Court's attention.

Last, respondents similarly misconceive petitioners' due process claim in their effort to explain why this Court's intervening decision in *Zinermon v. Burch*, 110 S. Ct. 975 (1990), does not confirm that the Tenth Circuit erred. In *Zinermon*, the Court held that *Parratt* does not control when a deprivation is foreseeable in the sense that it "w[ould] occur, if at all, at a specific, predictable point in the * * * process" (110 S. Ct. at 989), when predeprivation process is not "impossible" (*ibid.*), and when the officials' actions were pursuant to a delegated "power and authority to effect the very deprivation complained of here" (*id.* at 990). See Pet. 14-15.

Respondents first argue that the deprivation here was not foreseeable because "there is no way for the state to know or predict" when "its officials might * * * enter a

judgment debtor's home and take personal property." Hartman Br. in Opp. 7. Petitioners' complaint, however, is not that their property was taken but that it was taken without a meaningful prior hearing on their exemption claims. Such a due process violation plainly "occur[s], if at all, at a specific predictable point in the * * * process" – whenever a writ of execution encompassing personal property is sought after a judgment. Respondents next contend that "the nature of this deprivation makes it impossible for the state to provide a hearing to determine whether or not a state employee should engage in negligent or intentional conduct." *Ibid.* But what petitioners want obviously is not such a whimsical hearing as that. What petitioners want – and what due process requires – is a hearing on whether their property is exempt from execution before it is executed upon. As the parties were in the middle of such a hearing when the deprivation occurred, it cannot seriously be contended that such a hearing was impossible. Finally, respondents baldly assert that this deprivation was not pursuant to delegated authority (*ibid.*), but they make no effort whatever to respond to our showing to the contrary (Pet. 15-16).

3. We argued in our petition that respondent Barkley, Rodolph, White & Hartman could be held vicariously liable in a suit brought under Section 1983 for the actions of respondent Hartman (one of its partners) because Oklahoma partnership law indicates it should be so liable. We explained that, although this Court has held that Section 1983 does not *create* vicarious liability for government entities (see *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978)), it has never addressed the question whether Section 1983 *incorporates* state vicarious liability of private entities.

Respondents offer no reason why Section 1983 does not incorporate state partnership law other than the plainly distinguishable decision in *Monell* and scattered decisions relying on *Monell* without analysis. Hartman Br.

in Opp. 7-9. In particular, this Court has long presumed that Section 1983 does incorporate state-law principles (see Pet. 28), and that presumption should apply in this case, yet respondents completely fail to come to grips with it.[7]

4. The district court has recently granted summary judgment to respondents Weaver and Newton in their individual capacities on grounds of "absolute immunity" (the case is still pending against respondent Hartman). Weaver Br. in Opp. App. 1a-3a. Respondents assert that the issues presented in the petition are therefore now moot. Weaver Br. in Opp. 4-5; Hartman Br. in Opp. 11-12. To begin with, however, petitioners intend at the appropriate time to appeal the district court's judgment, which is erroneous.[8] Because there has not yet been a final

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[7] Even if 42 U.S.C. § 1988 provides no basis for vicarious liability in suits brought under Section 1983 (see *Moor v. County of Alameda*, 411 U.S. 693 (1973)), that cannot defeat our more fundamental argument that Section 1983 *incorporates* state vicarious liability law. See Pet. 26-28. Thus, well after the Court gave Section 1988 a narrow construction in *Moor*, it reserved the question whether another provision of the Civil Rights Acts incorporates state vicarious liability law with respect to private defendants. See *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391-395 (1982).

[8] The district court's order giving "absolute immunity" to Newton and Weaver for committing a Fourth Amendment violation while carrying out a writ of execution is plainly wrong. The decision on which the district court relied, *Valdez v. City and County of Denver*, 878 F.2d 1285 (10th Cir. 1989), provides only that "an official charged with the duty of executing a facially valid court order enjoys absolute immunity * * * in a suit challenging *conduct prescribed by that order.*" 878 F.2d at 1286 (emphasis added). Weaver and Newton were not engaged in "conduct prescribed by" the writ of execution when they took the step – which all concede to be an illegal means of executing a writ – of breaking down the door of the Watsons' home.

adjudication with respect to all defendants or an "express determination" that the partial judgment is final (Fed. R. Civ. P. 54(b)), the time for appeal is not yet running. Moreover, even if the district court's immunity ruling were correct, it would have no bearing whatever on the liability of Okmulgee County – the county has no immunity (see *Owen v. City of Independence*, 445 U.S. 622 (1980)) – or on the separate due process issues presented in the petition. Those issues need to be resolved.

For the foregoing reasons and those given in the petition, the petitioner for a writ of certiorari should be granted.

Respectfully submitted,

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